Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

KEM L. RALPH,
(individually and doing business as
Ralph Brothers Farms),

Petitioner,

v.

MONSANTO COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

I. Whether and to what extent a District Judge has discretion in ruling on a motion that he recuse from "any proceeding in which his impartiality might reasonably be questioned," when the Congress has enacted that he "***shall*** disqualify himself." 28 U.S.C. § 455(a) (emphasis supplied).

II. Whether the standard of review of a District Judge's refusal, under 28 U.S.C. § 455(a), should be *de novo*.

III. Whether under the totality of the circumstances now known, and within the meaning and contemplation of 28 U.S.C. § 455(a), a reasonable person would harbor doubts regarding the impartiality of Judge Rodney W. Sippel to have presided over the proceedings in *Monsanto Co. v. Kem L. Ralph, et al..*, E. D. Mo., No. 00-CV-135-RWS, filed January 28, 2000, given that

(A) as a private practicing lawyer, he was formally counsel of record for Monsanto Company from August 11, 1997 until January 30, 1998, in other important litigation;

(B) his former law firm represented Monsanto in other substantial litigation prior to his become a U. S. District Judge;

(C) he made no disclosure of his or his former firm's prior representation of Monsanto Company, 28 U.S.C. § 455(e);

(D) he refused to allow reasonable discovery, incident to a motion to recuse under 28 U.S.C. § 455(a), regarding his and his former firm's prior representation of Monsanto Company.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Petitioner Kem L. Ralph states that he is a farmer who has done business as Ralph Brothers Farms and has been a partner with his brother, Roger M. Ralph, in a partnership known as Ralph Brothers Farms.

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PETITION FOR A WRIT OF CERTIORARI AND/OR A WRIT OF MANDAMUS

Petitioner Kem L. Ralph respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Federal Circuit dated February 14, 2005. In addition, Petitioner respectfully requests a writ of mandamus directing that District Judge Rodney W. Sippel recuse himself in the premises.

OPINIONS BELOW

The Court of Appeals entered a Judgment on February 14, 2005 without opinion. *Monsanto Co. v. Ralph,* 122 Fed. Appx. 510 (Fed. Cir. 2005). App. 1. On March 4, 2004, the U. S. District Court for the Eastern District of Missouri delivered an oral bench denying Defendants' request for discovery and finally denying Defendants' Motion For Relief From Judgment grounded in 28 U.S.C. § 455(a). App. 4-24.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on February 14, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651.

STATUTES INVOLVED

28 U.S.C. § 455 provides in pertinent part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> * * * * *
>
> (e) . . . . Where the ground for disqualification arises only under subsection (a), waiver may be

accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

INTRODUCTION

We trust there is no more "important federal question" than the public's reasonable view of the fairness and impartiality of a U. S. District Judge who is charged to exercise vast discretionary powers. The work begun in *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847 (1988) remains substantially unfinished. The unfinished work affords a safe harbor for federal judges who will not or cannot accept the congressional mandate that their impartiality to sit in a given case "shall" be judged objectively from the perspective of the reasonable person on the street. 28 U.S.C. § 455(a).

Here, Monsanto Company, a former client of the District Judge – just one year, 363 days earlier the District Judge was formally counsel of record for Monsanto – has benefited substantially from the District Judge's exercise of his powers in a series of highly discretionary rulings that will, when enforced, all but ruin the farmer Petitioner. More important than this eye catcher, the District Judge's former law firm represented Monsanto in a number of other substantial matters while the District Judge was an equity partner. In a final peremptory exercise of discretion, the District Judge denied reasonable discovery on the recusal issues and summarily denied the motion itself only eight days after it was filed.

The matter is of moment to more than Petitioner. Farmers across America are forced to defend their farms in that Judge's district – the Eastern District of Missouri – by reason of Monsanto's forum selection clause. *Monsanto Co. v. McFarling*, 302 F.3d 1291, 1294-96 (Fed. Cir. 2002), *cert. den.*, 537 U. S. 1232 (2003).

Congress spoke in 1974, enacting today's 28 U.S.C. § 455(a). There is work to be done as "general propositions do not decide concrete cases," *Lochner v. N.Y.*, 198 U.S. 45, 76 (1905) (dissenting opinion). Section 455(a) and *Liljeberg* state only general propositions.

District Judges claim broad discretion in deciding motions for recusal under Section 455(a)'s general propositions. This is exacerbated by the abuse of discretion standard of review enforced in most courts of appeal,[1] including the Eighth Circuit, the applicable regional circuit.[2] *Moran v. Clarke*, 296 F.3d 638, 648 (8th Cir. 2002) (*en banc*). In conflict, the Seventh Circuit sensibly conducts *de novo* review, *viz.*, *Hook v. McDade*, 89 F.3d 350, 354-55 (7th Cir. 1996); *Taylor v. O'Grady*, 888 F.2d 1476, 1481 (7th Cir. 1989), and the Third Circuit is moving in that direction, *see In Re Kensington Int'l Ltd.*, 368 F.3d 289, 301 fn. 12 (3rd Cir. 2004), noting that Section 455 employs the mandatory "shall." In "abuse of discretion" circuits, there are regular dissents. *See, e.g., In Re Billedeaux*, 972 F.2d 104, 106-07 (5th Cir. 1992) (DeMoss, J., dissenting); *In Re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1321 (2nd Cir. 1988) (Lumbard, J., dissenting).

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[1] *See, e.g., Blizard v. Frechette*, 601 F.2d 1217, 1221 (1st Cir. 1979); *U. S. v. Arena*, 180 F.3d 380, 399 (2nd Cir. 1999); *U. S. v. Wilensky*, 757 F.2d 594, 599-600 (3rd Cir. 1985); *Shaw v. Martin*, 733 F.2d 304, 308 (4th Cir. 1984); *U. S. v. Bremers*, 195 F.3d 221, 226 (5th Cir. 1999); *Easley v. Univ. of Mich. Bd. of Regents*, 906 F.2d 1143, 1147(6th Cir. 1990) (implicitly endorsing the "abuse of discretion standard); *U. S. v. Martin*, 278 F.3d, 988, 1005 (9th Cir. 2002); *Hinman v. Rogers*, 831 F.2d 937, 938 (10th Cir. 1987); *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990); *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 882 F.2d 1556, 1567 (Fed. Cir. 1989) (applying the law of the 9th Circuit, the relevant Circuit in that case).

[2] On non-patent issues, the Federal Circuit applies the law of the circuit in which the case arose. *See Slip Track Sys., Inc.*, 304 F.3d 1256, 1262 (Fed. Cir. 2002); *and Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 882 F.2d 1556, 1567 (Fed. Cir. 1989) (applying the law of the 9th Circuit, the relevant Circuit in that case).

And so this case calls the Court to consider what the late Prof. Lon L. Fuller called "the most complex of all the desiderata that make up the internal morality of the law: congruence between official action and the law." *See* Lon L. Fuller, The Morality Of Law 81 (1964). This case exemplifies how layers upon layers of discretion undermine 28 U.S.C. § 455(a) and create a deadly disconnect between "official action" – what judges do in fact – "and the law" the Congress has written.

STATEMENT OF THE CASE

Kem L. Ralph is a farmer who lives just west of Covington, Tennessee. Mr. Ralph grows cotton, soybeans and corn on farmlands primarily in his home county of Tipton, with smaller tracts in neighboring Shelby and Haywood Counties in western Tennessee. A239-40. Mr. Ralph farms with his brother as Ralph Brothers Farms, a partnership. A238-40.

On January 28, 2000, Monsanto Company sued Mr. Ralph in the Eastern District of Missouri [St. Louis] for infringement of patents claiming herbicide tolerant and insect resistant seed trait products. In lay terminology, the Complaint charged Mr. Ralph with saving seed and selling "brown bag" seed, said to be infringing uses and sales of Monsanto's patented Roundup Ready and Bollgard trait products in Mr. Ralph's 1999 and 2000 soybean and cotton crops. Mr. Ralph had substantial defenses, including the fact that his name had been forged on the Monsanto Technology License Agreement which contained the forum selection clause that forced him to defend in St. Louis in the first place.

The case was assigned to U. S. District Judge Rodney W. Sippel. Judge Sippel did not disclose, see 28 U.S.C. § 455(e), that, until January 30, 1998, he was formally counsel of record for Monsanto in important litigation against Pioneer Hi-Bred International regarding the same patented

herbicide tolerant and insect resistant trait products. More importantly, Judge Sippel did not disclose that, prior to January 30, 1998, Husch & Eppenberger, the St. Louis based law firm in which then lawyer Sippel was an equity partner and served as Vice Chair of the Litigation Department, had represented Monsanto in a substantial number of other lawsuits.

In the proceedings below, Judge Sippel made important discretionary rulings, imposing on Mr. Ralph the most severe sanctions possible. On February 17, 2000, the District Judge refused to transfer the case from St. Louis to Memphis, Mr. Ralph's home district. On October 10, 2001, the District Court struck the Defendants' Answer, refused to consider his documented defense that his signature was forged on the contract containing the forum selection clause, dismissed substantial counterclaims, and ordered the case to trial on damages only. A273-74. On February 15, 2002, the District Court ordered Mr. Ralph to pay Monsanto $104,506.47 in additional sanctions. *Monsanto Co. v. Ralph*, 2002 U. S. Dist. LEXIS 27164 (E.D. Mo. 2002).

On June 17, 2003, following the damages only trial, the District Judge engaged in a devastating exercise of discretion when he trebled the compensatory damages awarded by the jury from $803,402 to $2,410,206, the maximum allowed by law, 35 U.S.C. § 284, and on top of that ordered that Mr. Ralph pay Monsanto another $500,000 plus in attorneys fees and costs. 35 U.S.C. § 285. On July 9, 2003, the District Court entered Judgment in favor of Monsanto and against Mr. Ralph in the aggregate amount of $2,937,527.07.

Six months later to the day, *The New York Times* published an article about another Eastern District of Missouri farmer case against Monsanto, assigned to Judge Sippel. The article states that "Before Mr. Sippel became a federal judge [in late January, 1998], Husch & Eppenberger

worked for Monsanto on about 16 lawsuits." A720. If this were so, it is clear beyond *per adventure* that when Judge Sippel was assigned the case of *Monsanto Co. v. Ralph*, No. 4:00-CV-135-RWS, his impartiality to sit in judgment in this case might reasonably be questioned, so that recusal became mandatory. 28 U.S.C. § 455(a). To this day, no on-the-record disclosure has been made. *See* 28 U.S.C. § 455(e).

Counsel for Mr. Ralph followed the leads that appeared from the *New York Times* article. On February 24, 2004, Mr. Ralph filed his Motion For Relief From Judgment And For Other Auxiliary Relief,[3] predicated on 28 U.S.C. § 455(a) and (b)(2). A877. Mr. Ralph sensibly sought discovery prior to the hearing on the Motion. A346-51, A839-76.

The Fed. R. Civ. P. 60(b)(6) Motion arose from matters that were not reasonably knowable to counsel prior to January 7, 2004. A721-23, A891-93. The District Judge had made disclosure of far more benign matters, and counsel reasonably assumed that, if there were further facts that might arguably impact the judge's impartiality under 28 U.S.C. § 455(a), they would be disclosed.

The discovery requests included interrogatories and requests for production to Monsanto, and a Fed. R. Civ. P. 45 subpoena to Husch & Eppenberger to produce documents. Mr. Ralph sought details about "Husch & Eppenberger work[ing] for Monsanto on about 16 lawsuits," details of Husch & Eppenberger's other representation of Monsanto while Sippel was an equity partner in that firm, and other matters relevant to the 28 U.S.C. § 455(a) recusal inquiry, such as the compensation Sippel received from his firm's representation of Monsanto. A350, A885.

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[3] *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847 (1988) holds that a motion under Fed. R. Civ. P. 60(b)(6), filed in the District Court, is the proper procedural vehicle for presenting the substantive issues of recusal, the central basis for which began to come to counsel's attention for the first time after final judgment.

On March 4, 2004, the District Court entered its final order in the form of a bench ruling, summarily denying Defendants' Motion For Relief From Judgment And For Other Auxiliary Relief, eight days after the Motion had been filed. The District Judge rejected out of hand Mr. Ralph's suggestion that he was entitled to reasonable discovery regarding facts reported in the *New York Times* article, and the implications of those facts.

On September 7, 2004, the Court of Appeals affirmed both the discretionary sanctions order, striking Defendants' Answer and Counterclaims and assessing $104,506.47 in damages, and, in addition, the Judgment for $2,937,527.07. *Monsanto Co. v. Ralph*, 382 F.3d 1374 (Fed. Cir. 2004). There can be no doubt that substantially softer sanctions would also have been affirmed, including sanctions leaving Defendants' pleadings, defenses and counterclaims in tact.

On February 14, 2005, the Court of Appeals, acting without written opinion, affirmed the District Court's denial of Petitioner's Fed. R. Civ. P. 60(b)(6) Motion predicated on Section 455(a). *Monsanto Co. v. Ralph*, 122 Fed. Appx. 510 (Fed. Cir. 2005).

REASONS FOR GRANTING THE WRIT

I. The Conflict Among The Circuits

The Federal Circuit presumably followed the Eighth Circuit, the applicable regional circuit, which holds the decisions of District Judges on Section 455(a) are viewable for abuse of discretion only. *Moran v. Clarke*, 296 F.3d 638, 648 (8th Cir. 2002) (*En Banc*). Numerous other Circuits hold that the denial of a motion to recuse is reviewed for abuse of discretion. See footnote 1, *supra*. At least one Circuit has recognized the problem in this. The Seventh Circuit reviews the denial of a motion to recuse under Section 455 *de novo*. *U. S. v. Balistrieri*, 779 F.2d 1191, 1203 (7th Cir. 1985), notes:

> We think that appellate review of a judge's decision not to disqualify himself, when he is asked to do so by a proper and timely motion supported by affidavits and perhaps other evidence, should not be deferential. The motion puts into issue the integrity of the court's judgment. The absence of the requirement that the judge take the factual averments of the moving party's affidavit as true 'gives the chance for the evil against which the section is directed.' In addition, a judge may be especially reluctant to recuse himself when to do so requires him to admit that his actual bias or prejudice has been proved. Accordingly, we will review decisions against disqualification under 28 U.S.C. § 455(b)(1) *de novo*. We will evaluate the evidence for ourselves, applying the same standard as the district court. (internal citations omitted).

See also, Taylor v. O'Grady, 888 F.2d 1189, 1201 (7th Cir. 1989) ("Appellate review of such claims is *de novo*, and the standard of proof is whether a reasonable person would be convinced that the judge was biased"). The Seventh Circuit explicitly applied *de novo* review to a Section 455(a) motion in *Hook v. McDade*, 89 F.3d 350, 353 (7th Cir. 1996).

Dissents in both the Fifth and Second Circuits also support heightened review when a judge denies a motion for recusal. In *In the Matter of Billedeaux*, 972 F2d 104, 107 (5th Cir. 1992), Judge DeMoss, dissenting, noted:

> Perhaps if the question were posed in the abstract , you would get a different answer; but my gut tells me that if the average person is asked whether he would feel comfortable having his own personal injury case tried by a judge whose spouse was a partner in a law firm that represented the defendant in other matters, the answer would be, 'Would the

> judge really be impartial?' I think that question is reasonable; and the mandatory language of § 455 requires recusal.

See also, In re Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1321 (2nd Cir. 1988).

The facts in this case are even worse than in *Billedeaux*. Here, the District Judge himself was an equity partner in a law firm that represented Monsanto in numerous high profile cases, from which he almost certainly received a share of those fees and profits. The District Judge served as counsel of record for Monsanto for four months, only two years prior to being assigned to this case, and other similar cases in which Monsanto was a party. He personally signed an Entry of Appearance and a Notice of Withdrawal as Counsel in at least one other case in which Monsanto was a party. Moreover, Judge Sippel made numerous harsh and adverse, discretionary rulings that are at best questionable under the circumstances. And when all of these facts were brought to his attention, he refused either to recuse himself and vacate the judgment or to allow reasonable discovery into these matters. These facts are more than sufficient that a reasonable person, knowing all the facts of the case, reasonably would question the judge's impartiality.

The conflict among the Circuits, regarding the appropriate standard of review when a judge denies a motion for recusal under 28 U.S.C. § 455 requires this Court's attention. Sup. Ct. R. 10(a). The question is of practical importance, as judges are no more able to apply generalized tests [such as that imposed by Section 455(a)] objectively to themselves than are the rest of humankind. The standard of review should be *de novo*, or at least the discretion normally accorded the trial judge should be appropriately narrowed.

II. The Court Failed To Follow *Liljeberg*

However wisely the Court may have decided *Sao Paulo, et al. v. Am. Tobacco Co.*, 535 U.S. 229 (2002), that *per curiam* opinion was seized upon by the District Judge as a way around the apparent mandate of the controlling precedent. *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847 (1988). *Sao Paulo* is particularly attractive to Judges who will not or cannot accept that their impartiality is reasonably subject to the reasonable judgment of "the average person on the street who knows all the relevant facts of a case." *Moran v. Clarke*, 296 F.3d 638, 648 (8th Cir. 2002), and who believe that they have "a duty to sit."[4] These trial judges know that their findings will be secure under the abuse of discretion standard of review.

The District Judge's bench ruling in the case at bar shows how easily *Liljeberg's* reasoned elaboration of 28 U.S.C. § 455(a) may be avoided. By affirming the District Court's multifaceted (mis)application of erroneous legal standards, the Court of Appeals "has decided an important federal question in a way that conflicts with the relevant decisions of this Court." Sup. Ct. R. Rule 10(c).

III. The Aggravating Circumstance of Monsanto's Forum Selection Clause, Forcing Farmers To Defend Themselves In St. Louis

Farmers around the country are directly affected by these issues. Monsanto requires that farmers sign a technology license agreement, if they wish to use Monsanto's patented Roundup Ready, Bollgard and other seed traits. These form agreements require the farmer to

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[4] Section 455(a) did away with the "duty to sit" doctrine. H.Rep.No. 93-1453, 93d Cong., 2d Sess., reprinted in U.S. Code Cong. & Admin. News, 6351, 6355 (1974). *See, e.g., Blizard v. Frechette*, 601 F.2d 1217, 1220 (1st Cir. 1979); *U. S. v. Wolfson*, 558 F.2d 59, 63 (2nd Cir. 1977); *U. S. v. Ritter*, 540 F.2d 459, 462 (10th Cir. 1976).

submit to suit in St. Louis – Monsanto's home town – whether the farmer lives and farms in North Carolina, Minnesota or California. *McFarling*, 302 F.3d at 1294-96, declared this forum selection clause wholly enforceable. Farmers who resist find themselves and their lawsuits routinely transferred to the Eastern District of Missouri. *See e.g., McNair v. Monsanto Co.*, 279 F. Supp. 2d 1290 (M. D. Ga. 2003).

Monsanto has recently sued a number of farmers for breach of the forum selection clause, asking that all be transferred to its St. Louis backyard. See *Monsanto Co. v. Bandy, et al.*, 04-CV-708-ERW (E.D. Mo. 2004), Complaint at ¶42. As a result, hundreds of farmers have been forced to defend themselves far from home and at great expense.[5] As much as any litigants in America, these farmers who are not lawyers are entitled to the absolute assurance – once they get to St. Louis – of an impartial district judge who will

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[5] At least five farmers from afar have found their cases assigned to Judge Sippel:

(1) On February 11, 1998, Monsanto filed its Complaint in *Monsanto Co. v. Knackmus*, E.D.Mo., No. 4:98-CV-261-RWS, which was assigned to Judge Sippel just two weeks he took the bench. A716-17. *Knackmus* was a suit by Monsanto against a seed saving farmer from Southeast Illinois.

(2) The case at bar was filed January 28, 2000.

(3) On November 6, 2000, Monsanto filed suit in St. Louis against Wayne Douglas White and Ronnie Edward White, farmers from Pasquotank County, North Carolina. *Monsanto Co. v. White*, E.D.Mo., 4:00-CV-1761-RWS. A749-55.

(4) On February 15, 2001, Monsanto filed suit in St. Louis against Garland Ray Harris, a farmer from Elizabeth City, North Carolina. *Monsanto Co. v. Harris*, E.D.Mo., 01-CV-253-RWS, and was assigned to Judge Sippel. A756-62.

(5) On December 11, 2001, Monsanto filed suit in St. Louis against Scott Miller and Scott Miller Farms, of Alexander County, Illinois. *Monsanto Co. v. Miller*, E.D.Mo., No. 4:01-CV-1938-RWS, and was assigned to Judge Sippel. A763-66.

show Monsanto no favoritism. These farmers are entitled to know that the district judges in St. Louis will scrupulously regard Section 455(a).

IV. Because *Liljeberg* Stopped Short, The Court Should Flesh Out The Nuances Of 28 U.S.C. § 455(a) That The Authority Of The District Judge And The Court Of Appeals May Be Practicably And Appropriately Cabined

A. Reasonable Discovery Supporting The Section 455(a) Motion, And The Average Person On The Street's Certain Perception Of The Denial Of Reasonable Discovery

This case presents important nuances to 28 U.S.C. § 455(a) recusal motions in ways that "ha[ve] not been, but should be, settled by this Court." Sup. Ct. R. 10(c). These include the movant's right to reasonable discovery. These also include the effect on the average person's reasonable perception of the District Judge's denial of reasonable and pointed discovery where full affirmative responses would mandate recusal, or, on the other hand, would end the inquiry, *if there are no grounds for recusal.*

1. Discovery On Section 455 Motions To Recuse

Reasonable discovery will often be required for a proper presentation of a Section 455 recusal motion. Reasonable discovery should be allowed in Fed R. Civ. P. 60(b)(6) requests, so long as the party acted in good faith and made out a reasonable case that discovery might lead to relevant information. See Fed. R. Civ. P. 26(b)(1). Judge Alex Kozinski makes the point in *U. S. v. State Of Wash.*, 98 F.3d 1159 (9th Cir. 1996), *viz.*

> [I]magine a newspaper report that Judge X secretly owned stock in a corporation that was a party before him some years ago. And imagine that the article

> reveals the name of a broker who maintained the judge's clandestine account. Surely the losing party would be entitled to obtain discovery from the broker to help figure out whether the judge had a financial stake in the outcome of the case. This is because the judge's stock ownership would have been grounds for disqualification under 28 U.S.C. § 455.

U. S. v. State of Wash., 98 F.3d at 1166 (concurring opinion). Judge Kozinski leaves no doubt that a party bringing a post-judgment Rule 60(b)(6) *Liljeberg* motion under these facts would be entitled to reasonable discovery. The Third Circuit has accepted this view in *In Re Kensingston Int'l Ltd.*, 368 F.3d 289, 300 (3rd Cir. 2004); and *In Re Kensingston Int'l Ltd.*, 353 F.3d 211, 214, 223 (3rd Cir. 2003).

Notwithstanding, the Court of Appeals has ruled contrary to this, affirming the District Judge's denial of an entirely reasonable request for discovery. This case exemplifies the need that this Court make clear that reasonable discovery should be allowed on Section 455(a) recusal motions. The point "has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

2. *The Common Sense Effect Of The District Judge's Denial of Reasonable Discovery On The Perception Of The Reasonable Person On The Streets*

There is no way around the fact that a district judge who denies reasonable discovery such as that proffered here leaves the "the average person on the street who knows all the relevant facts of a case" with the certain understanding that the judge is hiding something important. The denial of such discovery is one of "the relevant facts of a case" within the meaning of 28 U.S.C. § 455(a).

B. The District Judge's Course Or Pattern Of Rulings

The *En Banc* Eighth Circuit has held that "a judge's course or pattern of rulings" is among the circumstances that a reasonable person would consider. *Moran v. Clarke*, 296 F.3d 638, 649 (8th Cir. 2002). Here, the District Judge made a number of discretionary rulings, each of which was as harsh as it practically could have been against Mr. Ralph and in favor of Monsanto. This is particularly suspect when Monsanto is the former client of the District Judge and his former law firm. As noted above, the District Judge exercised his discretion in the harshest manner possible.

The reason it is so important that the District Judge not only be impartial, but that he also appear impartial is that "[a] finding of willful infringement [only] authorizes but does not mandate an award of increased damages." *Modine Mfg. Co. v. Allen Group, Inc.*, 917 F.2d 538, 543 (Fed. Cir. 1990). Here the District Judge ordered damages trebled in the face of any number of prior cases that counseled substantially lesser enhancement of damages, or no enhancement at all. *See, e.g., Va. Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 866-67 (Fed. Cir. 1997) (damages enhanced by only 10 percent, though infringement willful); *Bott v. Four Star Corp.*, 229 USPQ 241, 255 (E. D. Mich. 1985), *vacated on other grounds*, 807 F.2d 1567 (Fed. Cir. 1986) (damages increased by 20 percent); *Century Wrecker Corp. v. E. R. Ruske Mfg. Co.*, 913 F. Supp. 1256, 1291, 1295 (N. D. Iowa, 1996); *Am. Med. Sys., Inc. v. Med. Eng. Corp.*, 6 F.3d 1523, 1526 (Fed. Cir. 1993) (damages enhanced 1.5 times); *Datascope Corp. v. SMEC, Inc.*, 14 U.S.P.Q. 2d 1071, 1074 (D.N.J. 1990) (50 percent enhancement)

If – as is surely the case – consideration of "prior rulings" extends to other similar cases involving the same party favored in the case at bar and to the District Judge's conduct of proceedings on the recusal motion itself, it is important that this Court say so and say why. This was not

the first time Judge Sippel struck the pleadings of a Monsanto opponent and imposed sanctions. On February 25, 2002, Judge Sippel entered an order in *Massey v. Monsanto Co.*, E. D. Mo., No. 00-CV-1125, dismissing the Complaint with prejudice and imposing monetary sanctions of $55,100.44 against plaintiffs and in favor of Monsanto. A747.

If – as is surely the case – the *Moran* view is correct and it extends to other similar cases, involving the same party favored in the case at bar, and, as well, to the judge's conduct of proceedings on the recusal motion itself, it is important that this Court say so and say why. "A judge's course or pattern of rulings" is among the relevant facts of a case" that "the average person on the street" would consider, but this Court has never said so.

C. The Forgetful District Judge

Liljeberg was about a forgetful District Judge. This Court wrote,

> The judge's forgetfulness . . . is not the sort of objectively ascertainable fact that can avoid the appearance of partiality. [citing authority] Under Section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all of the circumstances, would expect that the judge would have actual knowledge.

Liljeberg, 486 U.S. at 860-61. A judge's "failure to disqualify himself [that] was the product of a temporary lapse of memory . . . [may] nevertheless [be] a plain violation of the terms of the statute [28 U.S.C. § 455]." *Liljeberg*, 486 U.S. at 861.

Here the District Judge also "forgot." On January 29, 1998, Judge Sippel's personally signed Notice Of Withdrawal as counsel for Monsanto was "filed" in the *Pioneer* case. A353. Judge Sippel was formally counsel of record for Monsanto from August 11, 1997 until January 30, 1998, when District Judge Richard Webber signed "Granted, 1/30/98" on Judge Sippel's Notice of Withdrawal. A353. The record shows that eleven envelopes respecting the *Pioneer* case, bearing the return address of the Office of the Clerk of the United States District Court, landed on Sippel's desk between August 11, 1997 and January 30, 1998. The average person on the streets is simply not going to believe that a lawyer, no matter how busy he is, is unaware of eleven envelopes from the Office of the Clerk of the United States District Court addressed to that lawyer. Yet Judge Sippel emphatically denied that Monsanto had been his client or that he was aware that he was counsel of record for Monsanto.

Judge Sippel repeatedly stated that he knew nothing about the case:

> "[L]et me be abundantly candid, so that there is no confusion: I was not aware of the Pioneer against Monsanto case." A813-14.
>
> "I never knew about the Pioneer against Monsanto case, and I didn't know anything about it, ..." A814.
>
> "[I]t's hard to disclose a case you don't know about that you never did anything on." A816.
>
> "Let me assure you that the word "participation" is as universally inclusive as I can humanly make it. I did not participate in the Pioneer against Monsanto case." A819.

> ". . . I didn't have any knowledge, no actual knowledge, no knowledge whatsoever, and no participation – no anything." A822.

The District Judge denied that his former law firm's prior representation of Monsanto was relevant. "The issue, you understand today, is not Husch & Eppenberger. It's me." A952. "And if a former client of my firm [Husch] is represented by another firm, that's not a reason for recusal." A953, A984-86, A988, A994.

The circumstance where the district judge may have forgotten his and his firm's substantial prior involvement with a client who now appears as a litigant before that district judge, presents important questions that "ha[ve] not been, but should be, settled by this Court." Sup. Ct. R. 10(c). Where that same former client appears, as here, at least four more times before the same district judge, the "average person on the street" surely at some point may expect that district judge to remember. And, if the district judge does not, his "impartiality might reasonably be questioned" by the "average person on the street."

D. The Presumption Of Access To Former Client Confidences

Given his formal attorney-client relationship with Monsanto, Judge Sippel is "conclusively presumed" to have "obtained confidential information about the [Monsanto side of the] issues in the [*Pioneer*] litigation." *Restatement (Third) Of The Law Governing Lawyers* § 132, com. *d*(*iii*). "The attorney client relationship raises an irrefutable presumption that confidences were disclosed." *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 608 (8th Cir. 1977); *see also, State of Ark. v. Dean Foods Prods. Co.*, 605 F.2d 380, 384 (8th Cir. 1979). The *Fred Weber* opinion explains that this irrefutable "presumption is an absolute necessity . . . ," *Fred Weber*, 566 F.2d at 608, citing and relying on *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562, 571 (2nd Cir. 1973).

According to Prof. Geoffrey Hazard, "The inference . . . is that Judge Sippel may have 'personal knowledge of disputed evidentiary facts' involved in the [*Pioneer*] proceeding." A1006. "Counsel for Monsanto in the prior litigation are presumed to have learned confidences from Monsanto about the Pioneer relationship and as well had a duty of loyalty to Monsanto as [a] client." A1005. Prof. Hazard presumes that Judge Sippel had access to confidential information because Prof. Hazard knows that is the law. *Fred Weber*, 566 F.2d at 608.

The problem is that this Court has never spoken to this important nuance of the former client problem under 28 U.S.C. § 455(a). It should do so now.

E. The Exacerbating Of Affirmance Without Opinion

In the face of the District Judge's facially deficient handling of the recusal motion, the Court of Appeals affirmed without opinion. The fair minded and objective third party observer – "the average person on the street" – would reasonably consider this little short of "sweeping under the rug" the "unreported" action of the District Judge. In this, the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, [and/]or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In addition, a writ of mandamus should issue to order recusal of the District Judge.

Respectfully submitted, this 12th day of May, 2005.

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